

Why the DOT Hours of Service (HOS) for Truck Drivers Needs to be Reformed The Current Rule is Illegal and Contributes to High Levels of Fatigue and Fatalities

FACTS *v.* **INDUSTRY FICTION** of the Proposed HOS Reform Rule

ISSUE: Highway Safety Under the Current HOS Rule—

INDUSTRY FICTION: Truck safety has improved as truck crash rates have declined in recent years.

FACT: There is no connection between the recent drop in annual crash rates and truck crash fatalities and the current HOS rule. The Federal Motor Carrier Safety Administration (FMCSA) acknowledges this fact in the proposed rule.¹ Fatalities in large truck crashes actually increased in the first two years (2004-2005) of the current HOS rule.² Recent decreases in truck crash rates are occurring for entirely separate reasons, such as the economic conditions, high diesel gas prices and other safety initiatives having nothing to do with the HOS rule. **FURTHERMORE,** there has been no decline in the portion of truck crashes associated with driver fatigue.³ Not only have the levels of police crash reports that cite fatigue as a causal factor remained constant from 2003 to 2008, but surveys of truck drivers also show higher levels of driver fatigue than before – 65% of truckers report that they are often or sometimes drowsy, and 48% admit that they have actually fallen asleep while driving in the previous year.⁴

ISSUE: Legality of the Current HOS Rule—

INDUSTRY FICTION: The current HOS rule adopted by FMCSA in 2008 is perfectly legal.

FACT: The current HOS rule has been struck down twice in 2 separate, unanimous federal court cases brought by safety and labor groups.⁵ In each case, unanimous panels of the Federal Court of Appeals in Washington, D.C. vacated the rule with scathing criticism of the agency rationale for increasing driving and work hours. The HOS proposed rule is the result of a settlement agreement in a third lawsuit that has been held in abeyance pending the outcome of the rulemaking.

The Federal Court Of Appeals Found: The FMCSA's explanations and reasoning for increasing the maximum consecutive driving hours and use of the 34-hour restart to be dubious and lacking in legal support. As noted above, the Court questioned the lack of consistency between the agency's findings of fact regarding driver fatigue and its decisions to increase the limits on driving and work time. The Court expressed "doubts" whether the justifications for the 11-hour limit were "legally sufficient[]",⁶ found the agency's cost-benefit analysis predicated on a "dubious assumption" which rendered reliance on the analysis "circular" and "doubtful,"⁷ and stated that the "rationality" for adopting the 34-hour restart without addressing the issue of cumulative fatigue was "questionable."⁸ The second Court of Appeals case, which was decided on different legal flaws, restated the criticisms noted in the earlier decision,⁹ and these legal problems remain relevant and actionable in the event the current HOS rule is kept in place.

ISSUE: Increasing Consecutive Hours of Driving to 11 Hours—

INDUSTRY FICTION: 11 consecutive hours of driving is safe and does not promote driver fatigue.

FACT: Truck crash risk increases exponentially after 8 consecutive hours of driving and the highest level of crash risk occurs during both the 10th and 11th hours of consecutive driving.¹⁰

The Federal Court of Appeals Found: "We have our doubts about whether the[] justifications [for extending the limit on consecutive hours of driving from 10 to 11 hours] are legally sufficient."¹¹ "The agency freely concedes that 'studies show [] that performance begins to degrade after the 8th hour on duty and increases geometrically during the 10th and 11th hours' on duty."¹² The exponential increase in crash risk that comes with driving greater numbers of hours . . . raises eyebrows about the agency's increase of daily driving time."¹³

ISSUE: 34-Hour Restart –

INDUSTRY FICTION: Drivers can get 2 full sleep periods in the 34-hour off duty restart period.

FACT: Drivers do not get 2 full nights of sleep in the foreshortened 34-hour off duty period. The 34- restart is a serious safety problem because:

- Drivers get shorter off duty time for rest and recovery at the end of weekly tours of duty. Prior to the current HOS rule and the restart, drivers who reached their 60- or 70-driving hour limit had to go off duty until the end of the work week, sometimes as much as 72 hours off duty. But with the current restart drivers can begin a new tour of duty after as little as 34 hours – less than a day and one-half – off duty;
- Many long-haul truckers drive at night and try to sleep during daytime hours, which conflicts with the normal human nocturnal sleep cycle and makes getting adequate rest during the 34-hour restart period even more difficult;
- Drivers who use the 34-hour restart build up cumulative fatigue from week to week that cannot be overcome by just a short, 34-hour off duty rest period.

The Federal Court of Appeals Found: “[T]he agency’s explanation . . . does not even acknowledge, much less justify, that the rule . . . dramatically increases the maximum permissible hours drivers may work each week. That increase is likely ‘an important aspect of the problem.’ And the agency’s failure to address it, accordingly, makes this aspect of the [current HOS] rule’s rationality questionable.”¹⁴ “FMCSA gave no explanation for the failure of its operator-fatigue model to account for cumulative fatigue due to the increased weekly driving and working hours permitted by the 34-hour restart provision. . . [t]he agency’s failure of explanation renders the restart provision arbitrary and capricious.”¹⁵

ISSUE: The Effect of Increased Off Duty Times—

INDUSTRY FICTION: By increasing off-duty time to 10 hours between shifts, and limiting the work day to 14 hours, the current HOS rule makes up for allowing more driving and work hours.

FACT: The current HOS rule, which allows 11 hours of consecutive driving and use of a 34-hour restart, dramatically increases the driving and working hours for truck drivers by more than 25%. Studies show that a large majority of drivers are using the added hours permitted under the current HOS rule. However, there are no research studies or data to support the view that the added 2 hours off duty between shifts, or the 14-hour limit on total work hours per shift, *provide any benefit* to offset driver fatigue toward the end of the 11-hour driving shift or to balance out cumulative fatigue from the additional hours of driving and working from week to week. Studies show just the opposite. Recent research conducted under the current HOS rule found that driver performance degraded and crash risk increased for driving occurring 10 or more hours after reporting for duty.¹⁶ Moreover, FMCSA concluded that to be alert and perform the driving task safely truck drivers need to get at least 7 to 8 hours of sleep each night. However, research has shown that under the current HOS rule truck drivers are getting *only 6 hours of rest* on work nights.¹⁷

ISSUE: Cost Effectiveness of the Proposed HOS Reforms—

INDUSTRY FICTION: Since the cost to the trucking industry would be about \$1 billion, the proposed reform rule is not cost effective.

FACT: The proposed changes to the HOS rule will provide more than \$2 billion in crash cost savings and driver health benefits that will benefit the American taxpayer in reduced crash and injury costs, lower medical and health payments and longer, healthier driver life expectancy.¹⁸

ISSUE: Impact of the HOS Rule Reform Proposal on Industry Jobs—

INDUSTRY FICTION: The current HOS rule enhanced productivity but the proposed rule is inefficient.

FACT: The current HOS rule provided a windfall profit to the trucking industry of over \$900 million dollars by eliminating nearly 50,000 driving jobs in the trucking industry.¹⁹ The current HOS rule adopted by the Bush Administration in 2003 is a jobs killing regulation. By contrast, the HOS rule reform proposal, by returning to the traditional 10 hour limit on consecutive hours of driving and allowing the 34-hour restart to be used only once each week, will create almost 40,000 new jobs for truck drivers.²⁰

INDUSTRY FICTION: The proposed rule will result in more trucks, adding to highway congestion.

FACT: By creating additional jobs the proposed reform rule will result in more truck drivers but because those drivers will be moving the same amount of freight the number of trucks will not have to be increased. The option to put additional trucks on the road is one motor carriers and shippers may choose to make, but it is not required by the proposed rule.

ISSUE: The HOS Rule Reform Proposal Effect on the Industry—

INDUSTRY FICTION: The proposed rule would be a drag on the U.S. economy and negatively impact the \$600 billion trucking industry.

FACT: The exaggerated claims of a calamitous impact on the trucking industry and the economy are patently false. The estimated billion dollar cost for the proposed HOS reform rule is a minute fraction of the overall cost to industry and represents less than one half of one percent (.005) of annual revenues from the trucking industry.²¹ In contrast, large truck crashes resulted in 3,380 deaths in 2009, at a cost to the nation of nearly \$20 billion, about one-half of all truck related crash costs. Moreover, the reformed HOS rules will not affect most drivers but will be targeted to those drivers most in danger of operating vehicles while fatigued, “primarily impact[ing] the 15 percent of drivers who average 70 or more hours on-duty per week.”²²

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SUPPORT THE HOS RULE REFORM PROPOSAL**

End Notes

- ¹ 75 FR 82176.
- ² Large Truck and Bus Crash Facts 2008, page 4, Table 1, FMCSA, Mar. 2010.
- ³ Trucks Involved In Fatal Accidents Factbooks 2003-2008, Transportation Research Institute, University of Michigan.
- ⁴ HOS Notice of Proposed Rulemaking, 75 FR 82170, 82177 (Dec. 29, 2010).
- ⁵ *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218 (D.C. Cir. 2004); *Owner-Operator Independent Drivers Association, Inc. (OOIDA) v. FMCSA*, 494 F.3d 188, 206 (D.C. Cir.2007).
- ⁶ *Public Citizen* at 1218.
- ⁷ *Id.* at 1219.
- ⁸ *Id.* at p. 1222.
- ⁹ *OOIDA op cit.*
- ¹⁰ 65 FR 25540. FMCSA includes Chart 5 that graphs the steeply rising increase in relative risk of fatigue crash after 8 consecutive hours of driving, *id.* at 25544, and goes on to state that there was a dramatic and consistent increase in crash risk after 8 hours, *citing* Lin, *et al.* (1993), *id.* at 25546.
- ¹¹ *Public Citizen, op cit.*, at 1218.
- ¹² *Id.* (citation omitted).
- ¹³ *Id.* at 1219.
- ¹⁴ *Id.* at 1222-1223 (citation omitted).
- ¹⁵ *OOIDA, op cit.*, at 206.
- ¹⁶ See e.g., Blanco, M., Hanowski, R.J., *et al.*, The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations, FMCSA, May, 2011. Despite the 10-hour off duty period and 14-hour day work limit of the current HOS rule, drivers still experience increases fatigue and crash risk when operating vehicles more than 9 hours after reporting for duty. Driving during the 10th through the 14th hour of the work day are associated with higher crash risk ("if a driver drives deep into the 14-hour workday, driving-related SCE [safety-critical event] risk increased", Blanco, page xxi).
- ¹⁷ 75 FR 82176 (emphasis added) citing the Virginia Tech Transportation Institute (VTTI) naturalistic study, Hanowski, *et al.*, "The Sleep of Commercial Vehicle Drivers Under the 2003 Hours-of-Service Regulations," *Accident, Analysis and Prevention*, Vol. 39, No. 6, pp. 1140-1145 (Nov. 2007) (VTTI study), FMCSA-2004-19608-3977. The VTTI study "provides the most reliable data on sleep under the current rule." 75 FR 82177.
- ¹⁸ 75 Federal Register 82172.
- ¹⁹ Regulatory Impact Analysis and Small Business Analysis for Hours of Service Options, page ES-5, Table ES-2, FMCSA (Dec. 2002).
- ²⁰ 2010-2011 Hours of Service Rule Regulatory Impact Analysis (2010-2011 RIA), page 6-17, Exhibit 6-26 FMCSA (Dec. 20, 2010).
- ²¹ 2010-2011 RIA.
- ²² *Id.*, page 3-1 to 3-2.